BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies	)	MM Docket No. 98-204

To: The Full Commission

JOINT CONSOLIDATED REPLY TO THE TWO PARTIAL OPPOSITIONS FILED AGAINST THE FORTY-PLUS STATE BROADCASTERS ASSOCIATIONS' "JOINT PETITION FOR RECONSIDERATION AND CLARIFICATION"

STATE BROADCASTERS ASSOCIATIONS

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The State Broadcasters Associations identified in Footnote 1 of the Joint Petition (collectively, the "State Associations"), by and through their attorneys, and pursuant to Section 1.429 of the Commission's Rules, hereby jointly, and in a consolidated way, reply to the partial oppositions filed by (i) Minority Media and Telecommunications Council, et al. (collectively, "MMTC") and (ii) National Organization for Women, et al. (collectively, "NOW") against the State Associations' February 6, 2003 "Joint Petition for Reconsideration and Clarification" ("Joint Petition") of the Commission's *Second Report and Order and Third Notice of Proposed Rule Making* in MM Docket 98-204, 17 FCC Rcd 24018 (rel. Nov. 20, 2002) ("*Second R&O"*). The continued participation of the State Associations on reconsideration and clarification remains without prejudice to any position any of them may take in connection with the *Second R&O* and the regulations adopted thereunder.

INTRODUCTION

As the State Associations have stated before, they have no lack of sympathy for the Commission as it engages in the difficult task of determining and implementing appropriate regulations in this area. Importantly, reconsideration affords the Commission the opportunity and responsibility to give the new regulations a hard look with an eye toward correcting any drafting

errors, eliminating any ambiguities and other defects, and otherwise examining ways to make the regulations more effective and efficient. The broadcast industry supports the Commission's commitment to insuring regulatory flexibility in this area. However, with that commitment comes the obligation to acknowledge that inherent in flexibility is uncertainty, and, therefore, the need, to avoid any tendency by the Commission to second-guess a broadcaster where there is no clear evidence that the broadcaster has acted in bad faith.

The State Associations are very pleased that only days ago the Media Bureau issued an Interim Policy providing nonexempt SEU's with additional time to adequately prepare, review, and finalize their annual EEO Public File Reports before they are due to be placed in their public inspection files and posted on their websites. *See* FCC Public Notice released March 31, 2003 (DA 03-1046). This is early evidence that the Commission is willing to take action now to make the new regulations more reasonable without undermining what they are intended to accomplish. Indeed, this flexibility is necessary if the Commission truly expects the new EEO Rule to achieve its full potential. Additional actions by the Commission of this type will benefit everyone by reducing the need to involve the Commission in endless requests for interpretive rulings, complaints, petitions to deny, objections, responsive pleadings, etc.

The State Associations are also pleased that MMTC has joined them in seeking an expeditious decision on reconsideration and that MMTC and NOW support the need for the Commission's/Bureau's interpretive rulings to be posted on the FCC's website. MMTC concurs with, or does not oppose, many of the proposals advanced by the State Associations, and NOW accepts some of the same proposals. As shown in their Joint Petition, the State Associations have made many constructive suggestions for improving the substance and administration of the new EEO Rule. In doing so, they have identified numerous drafting errors, ambiguities and other defects in the new EEO Rule and related forms that need to be corrected and addressed before the

Commission may reasonably expect all of the broadcast industry to be able to fully comply with the new regulations and, therefore, before any enforcement of the new rule may reasonably begin. NOW disagrees with the State Associations' position here, arguing that there is nothing in the new EEO regulations that was said, or left unsaid, that would impair a broadcaster's ability to proceed "in good faith" under each element of the new EEO Rule. What NOW does not address is (i) that at the core of the distinction between "good faith" and "bad faith" is the important element of "reasonableness" and (ii) that the clarity or lack of clarity in rule drafting is the beginning point in any determination of "reasonableness." The issues raised by the Joint Petition and Joint Reply well illustrate the numerous instances where action to remedy the new regulations is necessary.

Through its request for a delay in the effective date of the new EEO Rule, the State Associations sought to place the Commission on notice that if it chose to allow the new regulations, particularly the three prong requirements, to go into effect notwithstanding the numerous errors, ambiguities, and defects in the new EEO Rule, any enforcement action by the Commission, based on actions taken or not taken by broadcasters prior to any Commission action on reconsideration and clarification, would be legally suspect and otherwise inappropriate. As pointed out in the Joint Petition, the Commission consciously assumed the risk that specific EEO rules would be adopted without the benefit of public evaluation and comment on the details of the regulations and, therefore, that reconsideration and clarification would be not only appropriate but necessary. This assumption of risk by the Commission was caused by its refusal to grant the early reasonable request of MMTC to issue a draft set of the new EEO regulations at the same time the Commission was seeking comment on its Notice of Proposed Rule Making in this proceeding. Hopefully, now that the new EEO Rule is in effect, the Commission will act speedily on the petitions for reconsideration and clarification before it.

DISCUSSION

A. The Specific Required Changes/Clarifications to the New EEO Rule

If past history is prologue, it is a foregone conclusion there will be litigation over whether particular broadcasters have or have not complied with each and every requirement of the new EEO Rule. That being the case, evaluation of compliance will require a probing and critical analysis of what each provision of the new EEO Rule actually says and means. As a result, even under the new EEO Rule, the devil is still in the details. Accordingly, well before the heat of expected litigation, this is not only the appropriate time, but also the indispensable time for the Commission to put on its "contract-drafting-and-review hat" which emphasizes precision in drafting. In that spirit, and for the Commission's convenience and to speed its review, the State Associations are providing Exhibit A, attached hereto, which is structured to present each proposed change and clarification to the new EEO Rule on a section by section, subsection by subsection basis, in chronological order. Accompanying each proposal is the State Associations' rationale, the respective oppositions, concurrences and statements of no objection by MMTC and NOW (now that their positions are known), and the State Associations' rebuttals where warranted.[1] Some of the proposed rule changes and clarifications involve what might be called global issues in this proceeding, e.g., the State Associations' "Internet Plus" proposal, the substantial unnecessary burdens and risks of the new rule, and the need to expand the class of SEU's not subject to Subsections (b) and (c) of the new EEO Rule. Accordingly, those global issues are addressed in Section B of this Joint Reply.

[1] Section 1.49(d) of the FCC's Rules provides that exhibits to a pleading will not be counted against any page limit. In any event, due to the importance of this proceeding, the extensive and detailed nature of the new regulations, the decision of the Commission not to make public a set of the regulations during the comment period, the number of drafting errors, ambiguities and other defects discovered in the regulations as adopted, the vigorous opposition of MMTC and NOW to a number of proposed changes and clarifications, the need to address each opposition completely, and the need to insure a complete record, it is simply impossible to provide a reasonably adequate reply without being able to submit Exhibit A to the Commission at this time. Accordingly, any necessary waiver of the Commission's regulations is hereby requested for the reasons stated.

The need for this level of detailed and probing review of the new EEO Rule was recently confirmed by a very new Commission development. In its Public Notice released March 21, 2003 (DA 03-846), the Commission announced the release of a new version of FCC Form 303-S, the application form for renewal of broadcast licenses. That application form has the potential to serve as a loaded trap for broadcasters. The renewal applicant *for the first time ever* is being required to certify as to its compliance or noncompliance with *every applicable provision of the Communications Act of 1934, as amended, and every applicable provision of the Commission's rules and regulations going back the entire eight years of the station's license term* (FCC Form 303-S, Question No. 4). Now included within the scope of that certification is the new EEO rule. The Commission, therefore, has a particularly strong obligation to correct the errors, remove the ambiguities, remedy the other deficiencies, and to otherwise improve the regulations now, before the first set of radio renewal applications are filed by the June 1, 2003 deadline.

B. Some Of The Global Issues In This Proceeding

1. State Associations' "Internet Plus" Proposal

The State Associations have proposed an "Internet Plus" broad outreach program combining (i) the routine, well publicized, use of the Internet for job postings as the best way to assure direct dissemination of timely information to the largest number of potential applicants and (ii) a "mailing list" procedure of notices sent to those referral organizations which have expressed an interest in playing a meaningful role in referring potential applicants, including women and minorities ("Eligible Referral Organizations"). This plan emphasizes and promotes the critical importance of real time, convenient, direct communications between the broadcaster and enormous pools of potential applicants, while at the same time using the Commission's own "inclusiveness" device as a "safety valve to ensure that no segment of the community is inadvertently omitted from recruitment efforts." *Second R&O* at ¶ 106. *Accordingly, the State Association's proposal is not an*

"Internet Only" approach. Furthermore, the State Associations' "Internet Plus" proposal is intended to work hand in hand with the Commission's mandatory credit system of menu option initiatives which are "designed to further broaden outreach efforts to reach segments of the labor force who may be inadvertently omitted from vacancy-specific recruitment." *Second R&O* at ¶ 113. Accordingly, just as there are three prongs under the new EEO Rule, there would be three elements under the new EEO Rule if the State Associations' "Internet Plus" proposal were adopted.

The Commission's rejection of the State Associations' proposal is arbitrary and capricious. There is simply no discussion in the *Second R&O* in which the Commission stated that a mandatory, well publicized, Internet-based vacancy-specific posting requirement, even when coupled with a Prong 2 vacancy specific outreach notice requirement and a Prong 3 non-vacancy specific outreach initiatives requirement, is not reasonably adequate to insure sufficiently broad and inclusive outreach. On its face, the State Associations' "Internet Plus" proposal would be much more effective as an outreach tool since it would reach tens of millions of persons more than would be reached by any single referral organization or group of them. Throughout the *Second R&O,* the Commission refers to the State Associations' former "Internet Only" proposal that had been proposed by the State Associations *prior* to the time that the Commission adopted its former "Option A and Option B" EEO regulations. *Id*. at ¶¶ 95 and 99 ("As indicated above, [the State Associations have] proposed that we should deem posting of job vacancies on the Internet as constituting adequate recruitment") (citing the State Associations as one of the proponents of "the use of the Internet as a sole recruitment source….").

In defense of the Commission, NOW cites to footnote 180 of the *Second R&O* ("The State Associations' supported retention of this [outreach prong 2 notice] requirement in the context of its recruitment proposal"). However, the fact that the Commission acknowledged the second element of the State Associations' "Internet Plus" proposal is not a substitute for the Commission

demonstrating in its decision that it has evaluated the State Associations' essentially three element proposal. There is simply no discussion in the *Second R&O* evidencing that evaluation.[2]

Of great concern to the State Associations is NOW's apparent position that the Commission should not even use its Prong 3 credit program to encourage broadcasters to make more use of the Internet for recruitment. Everyone but NOW seems to accept the Internet's utility for many purposes including as a very valuable resource for job-related information. There are hundreds of local and national Internet-based career sites that are available 24/7 without the need to drive anywhere. Interested persons may communicate their interest in a position instantly at any time of day or night. In short, the recruitment over the Internet is deserving of the Commission's encouragement. In fact, in a News Release dated April 17, 2002, the Federal Office of Personnel

[2] To try to debunk the "Internet Plus" proposal, MMTC alleges that few broadcasters use the Internet to recruit. This is not true. NOW claims that broadcasters are "rarely" using Career Page websites to post job vacancies, and as "evidence" of its claim cites the number of job openings listed on NASBA's *national* website. What NOW fails to point out is that the majority of job listings are included on *individual* State Associations' websites, which currently include hundreds upon hundreds of additional job openings on their websites across the country. Moreover, NOW also fails to mention that even a cursory Internet search for job openings on the Internet results in thousands of additional broadcast job openings posted this year alone. *See, e.g.*, mediarecruiter.com; tvjobs.com; broadcast.net; monster.com; careerbuilder.com. Indeed, NOW itself uses the Internet as a useful tool to attract candidates for its internship programs. *See* http://www.now.org/organiza/intern.html. In any event, the contention is irrelevant since a mandatory Internet posting requirement would solve that "problem." MMTC and NOW argue that 46.1% of all persons and 49.5% of all households in the United States do not "use" the Internet. However, this means that every radio and television station in America has the capacity to inform 53.96% of all Americans who do use the Internet about their job openings. This represents more than 140 million persons in the United States. NOW argues that only 16.9% of the job seekers use the Internet to look for jobs. Even if that were true, and that figure remained static, Internet postings of broadcast jobs would still be valuable to tens of millions of persons in America. No single referral source or group of referral sources has the wide dissemination power of the Internet. MMTC argues that the Internet is "inherently impersonal." This is not true but more to the point, no recruitment process is impersonal. Along the way, individuals will be interviewed in person or over the telephone. MMTC also suggests that the Internet is too much an "old boys network." That suggestion is ridiculous. NOW argues that use of the Internet essentially "disqualifies" millions of people from being able to learn about job vacancies. If that were true, the Commission would not require members of the public filing applications to do so only electronically. Under NOW's analysis, not until Internet usage tops 100% should the Commission even consider the enormous broad outreach pluses of Internet postings.

Management announced that it would conduct a "virtual" job fair which "begins the implementation of [President Bush's e-Government] vision." *See* www.opm.gov/pressrel/2002. For the Commission to deny SEU's full Prong 3 credits for doing what the President is encouraging the Federal government and others to do would be unreasonable on its face.

2. The Substantial, Unnecessary, New Burdens On and Risks For Broadcasters

In their Joint Petition, the State Associations demonstrated how the new EEO Rule created numerous, substantial, unnecessary new burdens on and risks for broadcasters. In opposition to this position, MMTC and NOW essentially rely upon the Declaration of Eduardo Pena. Mr. Pena has concluded that an SEU with 20 employees could expect to devote between 7 and 38 hours per year to EEO compliance. His estimates are not to be credited. Exhibit B attached hereto well illustrates the many time consuming tasks and many unaccounted for assumptions that Mr. Pena apparently overlooked in his own analysis. In fact, the State Associations' evaluation of his analysis highlights how unreasonable it is for the Commission to require SEU's with only five or more full-time employees: (i) to try to comply with such a legally and factually uncertain wide/broad/inclusive dissemination concept (the "Internet Plus" proposal would substitute certainty), with the effect that stations need to use more and more referral sources simply in order to reduce regulatory risk; (ii) to produce annually an EEO Public File Report which is not even an FCC Form (thereby allowing the FCC to by-pass the Federal requirement to determine the length of time necessary to complete the Report); (iii) to list all non-Eligible Referral Organizations in such Reports; (iv) to list the names and telephone numbers of contact persons at each referral source in such Reports; (iv) to use only updated names and telephone numbers of contact persons at each referral source in such Reports; (v) to evaluate the productivity of every referral source and, as a consequence, run down every applicant whose application does not indicate the referral source and to keep evidence of the referral source of every applicant, even those who are not interviewed; (vi) to take the time with

management and counsel to determine which referral sources should be expunged from the referral lists and when; and vii) to risk FCC sanction for using one or more referral sources that the Commission considers are not productive. Furthermore, the State Associations' analysis demonstrates how unreasonable it is for the Commission to hold firm on limiting the exempt class of SEU's to only "less than 5 full-time employees."

3. Enlargement of the Class of "Exempt" Station Employment Units

SEU's with "less than 5 full-time employees" are exempt from Subsections (b) and (c) of the new EEO Rule. This definition of exempt SEU's needs to be enlarged significantly for several reasons.[3] MMTC and NOW oppose any enlargement in the class of SEU's which would not be subject to Subsections (b) or (c). They argue that the Commission has already relaxed other aspects of its new EEO Rule contrary to their wishes. The problem with that objection is that it is unresponsive to the reasons stated here for enlarging the class of exempt SEU's. NOW argues that the State Associations have waived their right to raise this issue now since they did not raise it in connection with the proceeding in which the Commission adopted the immediately preceding

[3] First, under the pre-Option A/Option B formulation of the Commission's EEO regulations, any individual "station" with less than 5 full-time employees was largely exempt under the Commission's EEO regulations. By substituting the concept of SEU's, which aggregates stations into a single unit, the Commission has, in effect, substantially reduced the applicability of the exemption without any rational basis. One example well illustrates the problem. Station A has 4 full-time employees. Separately owned station B has 4 full-time employees. Stations A and B merge and, as a result of economies of scale, 2 of the original 8 employees are let go. The SEU, with 6 full-time employees, is now operating two stations. There is no sensible reason to believe that this SEU is now more capable of handling all the EEO-related outreach, paperwork and reporting requirements of the new EEO Rule than an SEU with 4 full-time employees would be able to. Second, the largely opened-ended and legally uncertain requirement for nonexempt SEU's to disseminate information about full-time job openings "widely," "broadly," and "inclusively" naturally creates pressure on such SEU's to disseminate information to more and more referral sources, which in turn means more communications with these organizations, more data to be entered, more data to be checked and rechecked, more recordkeeping, more tabulations, more time to complete drafting and finalizing of reports, etc. Thus, for all these reasons, the new level for exempt SEU's should be at least "less than 15 full-time employees." If the three prong requirements of the new EEO Rule were extended to part-time positions, the new level should be at least "less than 20 full-time employees."

formulation of the EEO regulations. NOW's argument, for which it provides no case support, is without merit. Lastly, NOW argues that any expansion in the class of SEU's not subject to Subsections (b) and (c) would be contrary to *Office of Communications of the United Church of Christ v. FCC,* 560 F.2d 529 (2d Cir. 1977). The fallacy of NOW's argument is two fold. First, there was never any critical consideration given by the Commission to the ratcheting-down effect caused by the Commission staying at a "fewer than 5 full-time employees" level while at the same time aggregating more and more stations under the SEU concept. Second, the type of adjustment being proposed here would actually constitute an equivalent return to the level of exemption which was in effect before the Court overturned the Commission adjustment to it. These reasons constitute an adequate explanation of why the Commission is legally free to and should adopt the State Associations' proposal.

CONCLUSION

Based on the foregoing, the State Associations respectfully request the Commission to reconsider and clarify the *Second R&O,* including the new EEO regulations, fully consistent with the positions set forth in the Joint Petition and in this Joint Reply.

Respectfully submitted,

STATE BROADCASTERS ASSOCIATIONS

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STATE ASSOCIATIONS' JOINT REPLY

Exhibit A

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EXHIBIT A

1. Issues Regarding Transition Period For Applicability of the New EEO Rule

a. PROPOSED CLARIFICATION AND RATIONALE RE PRE-MARCH 10 JOB OPENINGS: The Commission should expressly confirm that if a nonexempt SEU had a full-time opening before the effective date, but was not able to fill the position by that date, the SEU may continue to proceed to complete the hiring phase on a pre-effective date basis without reference to the three prong requirements of the new EEO Rule. Otherwise, application of the new EEO Rule could further slow the process of filling the position.

MMTC and NOW POSITIONS: MMTC and NOW do not state any objection to this request. Accordingly, for the reasons previously stated, the State Associations request that the Commission confirm that any job opening that existed before the March 10, 2003, effective date of the new EEO Rule was not subject to the three prong requirements of the new EEO Rule.

b. PROPOSED CLARIFICATION RE EFFECT OF CONTINUOUS CHANGES IN NUMBER OF FULL-TME EMPLOYEES AND RATIONALE: These questions have arisen since the filing of the Joint Petition. First, if an SEU had less than 5 full-time employees on staff before the March 10 effective date of the new EEO Rule, but later expanded its staff to 5 or more full-time employees, when is the first date when the SEU must comply with the three prong requirements of the new EEO Rule? In reverse, when is the first date when these prong requirements will not apply if an SEU's full-time employee staff drops below 5? Also, the same questions are raised with respect to the menu option credits since the required minimums of 2 or 4 will vary depending upon how many full-time employees a SEU may have at any point in time.

2. Drafting Issues Regarding Section 73.2080(a) General EEO Policy

a. PROPOSED CHANGE AND RATIONALE RE "CANNOT" VERSUS "MAY NOT": In the third sentence of Subsection (a), the words "may not" should be substituted for the words "cannot" because "can" connotes ability whereas "may" connotes what is permissible or not. Anyone has the ability to violate the law; no one has permission to do so.

MMTC AND NOW POSITIONS: MMTC states that the first proposed change is "unobjectionable." NOW does not state any objection to that proposed change. Accordingly, the rule provision should be amended for the reasons stated.

b. PROPOSED CLARIFICATION AND RATIONALE RE "UNINTENTIONAL" DISCRIMINATION: The Commission has stated that it is concerned not only with "intentional discrimination," but also with "unintentional discrimination." *Second Report and Order and Third Notice of Proposed Rule Making* in MM Docket 98-204, 17 FCC Rcd 24018 at ¶ 57 (rel. Nov. 20, 2002) ("*Second R&O"*). The State Associations request clarification of what the Commission means by "unintentional discrimination." A few examples would be helpful.

MMTC and NOW POSITIONS: NOW does not state an objection to this clarification. MMTC, however, argues that the State Associations should tell the Commission "what they do not understand about the term. The FCC should not have to guess." This is not a game. The term is used by the Commission in its own *Second R&O*. The Commission apparently expects broadcasters to avoid not only intentional discrimination, but unintentional discrimination as well. In the absence of some examples of what the Commission means, or at least some reasonably articulate explanation, no broadcaster can reasonably be charged with violating any prohibition against unintentional discrimination.

c. PROPOSED CHANGE AND RATIONALE RE RELIGIOUS PREFERENCE: All provisions of the new EEO Rule and related FCC Forms should be expressly qualified to make clear

that religious broadcasters have the right to prefer employees who share their religious affiliation or belief so long as they do not discriminate on any other basis. The new EEO Rule and related forms throughout contain references to "religion" that are not qualified in this way. This change will eliminate an ambiguity which inappropriately casts religious broadcasters in a noncompliance light. Accordingly, it is recommended that the following sentence be added at the end of this Subsection:

> "All sections and subsections of this Rule and related FCC Forms are hereby qualified by the right of religious broadcasters, with respect to positions determined by such broadcasters to require religious affiliation or belief, to prefer employees for such positions who share their religious affiliation or belief so long as they do not discriminate on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief."

MMTC and NOW POSITIONS: NOW does not state any objection to this proposed change. MMTC does not appear to object to the proposed addition to the rule so long as it is understood that the right of a religious broadcaster to prefer an employee based on religion only applies to positions determined by religious broadcasters to require religious belief or affiliation. While that qualification is already clear from the language of Section 73.2080(a), the State Associations have now built that into their suggested language above. Accordingly, the rule provision should be amended for the reasons stated.

3. Definition of a "Station Employment Unit" for Purposes of Subsections (b) and (c)

PROPOSED CHANGE AND RATIONALE RE ENLARGEMENT OF CLASS OF SEU'S EXEMPT FROM SUBSECTIONS (B) AND (C): This issue is discussed fully at Section B. 3. of the Joint Reply.

4. Drafting Issues Regarding Section 73.2080(b) General EEO Program Requirements

PROPOSED CHANGE AND RATIONALE RE "STATION" VERSUS "SEU": The requirements of Subsection (b) are phrased in terms of a "broadcast station," whereas the requirements of Subsection (c) are phrased in terms of "station employment units." In order to ensure consistency, the matter should be resolved in favor of using the term "station employment

unit" in Subsection (b).

MMTC and NOW POSITIONS: MMTC states that this change is "unobjectionable." NOW does not state any objection to the proposed change. Accordingly, this rule provision should be amended for the reasons stated.

5. Drafting Issues Regarding Section 73.2080(c)(1) Specific Program Requirements

a. PROPOSED CHANGE AND RATIONALE RE "EXIGENT CIRCUMSTANCES" EXCEPTION: Subsection (c)(1) requires each nonexempt SEU to "Recruit for every full-time job vacancy in its operation." The *Second R&O* evidences a Commission "intent" that there be exceptions for internal promotions and for "exigent circumstances." In order to eliminate a technical violation of the rule even when an SEU proceeds properly under either of these exceptions, the quoted sentence should be modified to read as follows:

> "Recruit for every full-time job vacancy in its operation except in cases of internal promotions and where exigent circumstances exist."

This request is not simply a matter of detail. Financing arrangements with lenders and others require broadcast borrowers to enter into detailed sets of representations, warranties, and covenants concerning compliance with Commission regulations. No broadcaster wants to be accused of violating any of those provisions simply because the rule does not comport with the Commission's clear intent.

MMTC and NOW POSITIONS: MMTC states that this change is "unobjectionable." NOW does not state any objection to the proposed change. Accordingly, the rule provision should be amended for the reasons stated.

b. PROPOSED CHANGE AND RATIONALE RE RELIGIOUS "BELIEF": In Subsection (c)(1), the reference to religious broadcasters requires the addition of the words "or belief" at the end of the sentence so that it is precisely parallel with the language contained in

Subsection (a).

MMTC and NOW POSITIONS: MMTC states that the proposed change is "unobjectionable." NOW does not state any objection to the proposed change. Accordingly, the rule provision should be amended for the reasons stated.

c. PROPOSED CLARIFICATION AND RATIONALE RE "CONTINUOUS RECRUITMENT": The Commission should clarify the circumstances under which an SEU may rely upon applications received as a result of "continuous recruitment" without having to recruit for a specific job opening.

MMTC and NOW POSITIONS: The State Associations agree with MMTC that the Commission's statement of policy in the *Second R&O* (at ¶ 90) is sufficiently responsive to this issue.

d. PROPOSED CLARIFICATION AND RATIONALE RE APPLICATION OF THE 3 PRONG REQUIREMENT TO RELIGIOUS BROADCASTERS: After the Joint Petition was filed, questions have been raised about the application of the 3 prong requirement to religious broadcasters under various scenarios. It is clear that if a religious broadcaster has fewer than 5 full-time employees, the religious broadcaster is not required to comply with any of the 3 Prong requirements of the new EEO Rule. If a religious broadcaster has 5 or more full-time employees, all of whom hold religious qualified positions, it is also clear that the religious broadcaster is required to comply with Prongs 1 and 2 and make reasonable, good faith efforts to recruit applicants without regard to race, color, national origin, or gender, among those who are qualified based on their religious belief or affiliation. However, that religious broadcaster with only religious qualified positions is not required to comply with Prong 3. It is also clear that a religious broadcaster, irrespective of how many religious qualified positions it has, but, who has five or more full-time

non religious qualified positions must comply with Prongs 1, 2 and 3 vis-à-vis the non-religious qualified positions.

However, it is not clear whether the 3 Prong requirements of the new EEO Rule would apply where a religious broadcaster has eight full-time employees, only four of whom hold religious qualified positions and only four of whom hold nonreligious qualified positions. Under this scenario, the religious broadcaster has fewer than 5 full-time employees who hold religious qualified positions and fewer than 5 full-time employees who hold nonreligious qualified positions. Does the application of Prongs 1 and 2 to the religious broadcaster turn on whether or not the religious broadcaster has 5 or more nonreligious positions, irrespective of how many full-time employees the religious broadcaster has? It is also unclear how the new EEO Rule may apply where the religious broadcaster has five or more full-time religious employees but fewer than five full-time non religious employees. It seems unreasonable on its face to insist that a religious broadcaster who has less than 5 full-time non-religious positions must comply with all three prongs of the New EEO Rule.

In addition, the Commission has provided no guidance as to how a religious broadcaster is supposed to comply with the annual EEO Public File Report requirement. It would appear that a religious broadcaster with five or more full-time religious employees and five or more full-time non-religious employees would have the extra burden of completing reports for both categories - something a non religious broadcaster does not have to do.

e. PROPOSED CLARIFICATION AND RATIONALE RE PROMOTION OF INTERNS: This question was recently asked as an EEO legal seminar sponsored by one of the State Associations. Under the new EEO Rule, a temporary employee or a part-time employee who was hired for his or her position as a result of broad outreach (wide dissemination) may be promoted to a full-time position without the need for broad recruitment. The question is: if an

intern were selected through some form of outreach at a particular educational institution, or more broadly, may such intern be hired as a full-time employee without the station being required to engage in broad outreach for the position to be filled by the intern?

f. PROPOSED CLARIFICATION AND RATIONALE RE TREATMENT OF INTER-COMPANY EMPLOYEE TRANSFERS: The Commission has stated that it will not require recruitment for internal promotions or for the hiring of temporary employees. The examples provided by the Commission are limited to moving a temporary employee to full-time status or moving a part-time employee to full-time status. Those examples do not take into account the following scenarios for which guidance/clarification is needed. Specifically, are any of the following "moves" considered "openings" for which full recruitment must occur in any of the following situations:

1. SEU #1 is comprised of radio stations A and B in the market A/B. A full-time account executive employed at station A is being moved over to station B become an Account Executive. Is this an "opening" for purposes of recruitment? Does it matter whether or not the account executive is getting a raise at station B or the employee will have a better financial opportunity at station B?

2. SEU #2 is comprised of radio stations C and D in market C/D. SEU #1 and SEU #2 are commonly owned. An account executive employed at station B in market A/B relocates to station C in market C/D as an account executive. Is this an "opening?" Does it matter whether or not the account executive is getting a raise at station C or the employee will have a better financial opportunity at station C? Does it matter whether the person is being re-located because of a family situation unrelated to his or her job performance?

3. An employee is hired in a full-time position, but upon assessment, is not well suited to it and is reassigned to another position? Is this reassignment an "opening" for recruitment

purposes? Does it matter if the position to which the employee is transferred is generally considered to be a lateral or even a lower position? Would this not be preferable to firing the employee?

g. PROPOSED CLARIFICATION AND RATIONALE RE "INTERVIEWING BY E-MAIL": The Commission should confirm that "interviewing" includes in person, by telephone, and by e-mail. This is necessary in order not to prejudice anyone who may be unable, because of distance, timing or money, to meet personally with the station's staff.

MMTC and NOW POSITIONS: MMTC does not oppose the proposition that interviews by telephone are permissible, only that the interviewer must hear the person's voice some time during the interview process and therefore "interviews" conducted exclusively by e-mail should not be acceptable. NOW takes the same position in opposition to interviews conducted exclusively by e-mail. Interviews by email are not unlawful and MMTC and NOW do not claim to the contrary. That being the case, the Commission should not seek to micromanage this process.

h. PROPOSED CLARIFICATION AND RATIONALE RE IMPACT OF REQUIREMENTS OF UNION AGREEMENTS ON OUTREACH EFFORTS: Some union contracts contain clauses requiring that vacant positions and/or newly created positions must be offered to union members before any individuals from outside the station are considered for the position. The new EEO Rule encourages cooperation with unions. The Commission should clarify that hiring union members, without outside recruitment, complies with the EEO rule.

6. Reconsideration of Section 73.2080(c)(1)(i)

PROPOSED CHANGE RE "INTERNET PLUS" PROPOSAL: For the reasons set forth in the Joint Petition, this provision should be reconsidered by replacing it with the State Associations' "Internet Plus" proposal. Subsection (c)(1)(ii) already contains the referral organization prong of the State Associations' proposal. Accordingly, only the following language would need to be substituted for the current language of Subsection (c)(1)(i):

"A station employment unit shall (i) post all of its nonexempt full-time job openings on one or more Internet web sites which are available to the general public at no charge, (ii) broadcast announcements over its station(s) from time to time advising its listeners or viewers, as the case may be, what URL address or addresses may be used to access the information, and (iii) give due consideration to all employment applications and other expressions of interest received from any source."

MMTC and NOW POSITION: Both MMTC and NOW are of the view that the Commission "properly rejected" the State Associations' "Internet Plus" proposal. This issue is discussed at length in Section B of the Joint Reply. For the reasons stated therein, the Commission should still amend its rule provision as specified above.

7. Drafting Issues Regarding Section 73.2080(c)(1)(ii)

PROPOSED CHANGE AND RATIONALE RE "WRITTEN" REQUESTS FROM REFERRAL ORGANIZATIONS: In the first sentence of Subsection (C)(1)(ii), the word "written" should be inserted between the words "upon" and "request" to make it clear that unless the SEU has received from an organization a written request to be placed on the SEU's "mailing list" for job openings, the SEU is not legally responsible for giving such organization notice of openings. This will reduce the incidences of controversies in the future. An e-mail request would be deemed a written request.

MMTC and NOW POSITIONS: MMTC states that the proposed change is "unobjectionable." However, NOW objects on the ground that a referral organization should be

allowed to make telephone requests which, in essence, would be legally binding upon each station. NOW's position is unreasonable. Surely a broadcaster has the right to ask an organization to at least confirm in writing its interest in receiving the job vacancy information and the accuracy of its contact information. That being the case, why is it unreasonable for a broadcaster, who fields a call from an organization which wants to be placed on the station's job vacancy mailing list, to ask the caller to mail, fax or e-mail a request along with contact information to the station at a mail/fax and/or e-mail address given by the station over the phone? For example, the broadcaster needs adequate protection from accusations by organizations that claim they spoke to someone at the station but never received any notices of job vacancies, from complaints that the faxes the station sent to unaffiliated entities and organizations had not been authorized, etc. The State Associations have no objection to organizations being able to call stations to find out to whom they may send their requests, but such organizations should be prepared to supply the necessary information by mail, fax or e-mail. Accordingly, the rule provision should be amended for the reasons stated with this minor change: the words "or electronic" should be added after "written" to provide added flexibility for members of the public.

8. Drafting Issues Regarding Section 73.2080(c)(2) Menu Option Initiatives

As stated in the Joint Petition, the State Associations are actively engaged in conducting seminars for their stations in order to help them comply with the new EEO Rule. Experience at those seminars has shown that there are a lot of questions and confusion about many of the sixteen menu option initiatives. Thus certain revisions and/or clarifications are necessary or appropriate:

a. PROPOSED CLARIFICATION AND RATIONALE RE "MIXING AND MATCHING" MENU OPTION INITIATIVES: The Commission should make it clear that it allows SEU's to "mix and match" certain of the initiatives to obtain full credits. For example, the Commission will allow an SEU to earn one credit for participation in at least four job fairs, one

credit for participation in at least four events sponsored by organizations representing groups present in the community interested in broadcast employment issues, and one credit for participation in at least four events or programs sponsored by educational institutions relating to career opportunities in broadcasting. As each type of "initiative" requires participation in four events, each event is worth a quarter credit. Thus, all of those events are weighted the same. The Commission should allow an SEU to claim a full credit by combining partial credits earned from participation for example, in two job fairs, one community organization sponsored event and one educational sponsored event. This way, the Commission recognizes that not all communities are the same in terms of size and types of organizations. This flexibility in no way reduces the commitment of broadcasters. Rather, it rewards broadcasters for diversifying the types of events in which they participate.

MMTC and NOW POSITIONS: MMTC states that this proposed change is "creative and constructive." NOW does not object so long as the total outreach effort is not diminished. As is clear from the State Associations' proposal, the idea is to encourage diversity of activities without any diminution in the total number of credits required. Accordingly, the Commission should make clear that such "mixing and matching" is expressly permitted as a way for SEU's to earn full credits.

b. PROPOSED CLARIFICATION AND RATIONALE RE PARTIAL CREDITS FOR SEU'S WHOSE GROUP OWNER HIRING REPRESENTATIVES PARTICIPATE IN NATIONAL AND REGIONAL JOB AND CAREER FAIRS: At Subsection (c)(2)(i), an SEU may obtain a full credit for participating in at least four job or career fairs by station personnel who have substantial responsibility in making hiring decisions. Many group owners send high level personnel to national and regional conventions, like the NAB Convention and its Radio Show during which the NAB sponsors concurrent job or career fairs. The Commission should allow any SEU, that is

affiliated with a group owner which is represented by one or more people with substantial responsibility for hiring decisions at such a national or regional job or career fair event, to earn a quarter credit so long as the affiliated SEU has received copies of and will consider, the resumes and applications received by its affiliated representative(s) at the national or regional job or career fair event.

MMTC and NOW POSITIONS: MMTC states that this proposed change is "unobjectionable." NOW is opposed however. NOW fails to note that this proposal is expressly limited to national and regional job or career fairs. This flexibility is necessary to incentivize, particularly group owners, to have a greater presence at national and regional job and career fairs, like those sponsored by the NAB as well as some of the State Associations. The expanded presence of these group owners represents more career opportunities than would otherwise be the case which, in turn, encourages more potential job seekers to attend. Accordingly, the Commission should make it clear that job and career fair-related quarter credits may be earned in these specific circumstances.

c. PROPOSED CLARIFICATION AND RATIONALE RE "CO-HOSTING" JOB FAIRS: At Subsection (c)(2)(ii), the term "hosting" of job fairs is used. It is not clear whether the Commission would allow an SEU to earn a full credit for "co-hosting" of a job fair and if so, what limitations, if any, would apply. An SEU should be able to claim a full credit for "co-hosting" a job or career fair with one or more other affiliated or unaffiliated SEU's, so long as the participation of each SEU is meaningful. The Commission should favor this interpretation since two or more SEU co-hosts for a job or career fair will enlarge the exposure of attendees to more station employment opportunities which, in turn, will increase the number of attendees.

MMTC and NOW POSITIONS: MMTC states that this proposed change has "merit" so long as each co-host actually performs meaningful work. The State Associations do not

disagree. That is understood. NOW is opposed to the idea on the ground that the ability to co-host will reduce the number of separate job fairs. However, NOW's concerns are more theoretical than real. Furthermore, NOW would have the Commission believe that the quantity of job fairs is more important than the quality of job fairs. The quality of a job fair is largely determined by the number and types of potential job opportunities. Furthermore, NOW overlooks the fact that the proposal will incentivize broadcasters to work together to conduct job fairs with more publicity and more career opportunities than would be the case if only a single broadcaster were to host its own job fair. Accordingly, the proposed change should be adopted with the understanding that each co-host SEU participate in a meaningful way in the preparation, promotion and execution of the co-hosted job or career fair.

d. PROPOSED CHANGE AND RATIONALE RE "SUBSTANTIAL" PARTICIPATION OF WOMEN AND MINORITIES: At Subsection (c)(2)(iii), the phrase "whose membership includes substantial participation of women and minorities" is used. First, the phrase "significant participation" should be substituted for "substantial participation" since not all communities in America have the same number of minorities. Furthermore, organizations with "significant" minority participation should be just as valuable as resources as those which have "substantial" minority participation. Second, the phrase "women and minorities" should be changed to "women and/or minorities." Otherwise, no credit would be possible for an initiative with an organization that has significant or substantial female participation but no significant or substantial minority participation because the minority population in the particular area is so small. Again, there is not one uniform demographic throughout America.

MMTC and NOW POSITIONS: MMTC states that this proposed change is "unobjectionable." NOW objects. NOW is concerned that the threshold "significant" is not high enough. What NOW does not appreciate is that if the threshold is too high, the new EEO Rule will

not work as an incentive for broadcasters to team up with organizations with even "significant" but not "substantial," representation of minorities or woman. NOW does not object to the State Associations' "and/or" proposal. Accordingly, the rule provision should be amended for the reasons stated.

e. PROPOSED CLARIFICATION AND RATIONALE RE INTERNSHIP PROGRAMS: At Subsection (c)(2)(v), the words "establishment" and "community" are used. A number of State Associations have established statewide internship programs. Individual stations, in turn, accept these interns for placement at their stations. The Commission should confirm that this is acceptable since it is irrelevant who first "established" the program so long as the station provides a meaningful opportunity for its interns who were recruited through the State Association's internship program. The Commission should also confirm that it did not intend to limit a station's interns to those persons who reside in the local "community." Otherwise, such a lack of geographic flexibility will retard the development of these internship programs.

MMTC and NOW POSITIONS: MMTC states that this proposed change is "unobjectionable." NOW does not state any objection to the proposed clarification. Accordingly, the Commission should issue the requested clarification for the reasons stated.

f. PROPOSED CHANGE AND RATIONALE RE "CAREER PAGE" CREDIT: At Subsection (c)(2)(vi), the State Associations, NASBA, the NAB, and others have developed Career Page web sites for use on a state by state and national basis. These web sites are valuable resources for people to learn more about careers in broadcasting and the educational and training opportunities for such careers, including scholarships and internships. They also provide opportunities for broadcasters to post their openings so there can be direct communications between the two. On its face, if an SEU regularly posts its job openings on such a web site, it should be eligible for a credit since there is no better example of an employer increasing job opportunities

than for that employer to notify the "local community" and the "world" that it has specific openings. The Commission should confirm the State Associations' understanding that a full credit is earned when an SEU routinely posts its full-time job vacancies on the Internet. If the Commission were to adopt the State Associations' "Internet Plus" proposal, it would be understood that there would not be a separate menu option initiative credit for such postings.

MMTC and NOW POSITIONS: MMTC does not oppose this request so long as the website is well publicized and "is interactive, e.g., by allowing candidates to post their resumes." The State Associations have no objection to the Commission conditioning this menu option credit on the SEU (i) using one or more websites that allow candidates to communicate directly, i.e., interact with, the SEU listing the job vacancy and (ii) publicizing the website or websites that the SEU uses. However, the State Associations do object to limiting SEU's to only those websites which have the capability to allow candidates to post their own resumes. NOW opposes this credit on the ground that SEU's are free to use the Internet to at least partially meet their obligation to widely disseminate information about every full-time job opening. The problem with NOW's position is that the menu option initiative is clearly intended to encourage broadcasters to more routinely use the Internet in their outreach efforts for the good and substantial reasons identified in Section B of the Joint Reply.

g. PROPOSED CLARIFICATION AND RATIONALE RE SCHOLARSHIP PROGRAMS: Another question often asked by broadcasters relates to Subsection (c)(2)(vii). What constitutes adequate "participation" in a scholarship program? Is making a donation to the scholarship program sponsored by a State Association or its Foundation enough? If not, the Commission should confirm that meaningful participation would exist if an SEU were to: (i) make whatever donation is prescribed by the State Association or affiliated or unaffiliated foundation or other entity, (ii) promote the scholarship program over the air or by other means, (iii) provide

application forms to interested candidates, and (iv) field questions from candidates as they arise. Applicants would be expected to return their completed applications to the evaluation committee comprised, most often, of educators, not broadcasters. However, SEU's would not be required to be involved in the selection process itself.

MMTC and NOW POSITIONS: MMTC states that this proposed clarification is "unobjectionable." NOW does not state any objection to the proposed clarification. Accordingly, the Commission should issue the requested clarification for the reasons stated.

h. PROPOSED CHANGE AND RATIONALE RE MENTORING PROGRAMS: At Subsection (c)(2)(ix), credit for mentoring programs is limited to mentoring programs for "station personnel." This is unduly limited. While many mentoring programs are internally oriented, many are externally oriented. Station employees mentor young people in high school and college in order to help them develop a keen interest in broadcasting and to guide them in their academic pursuits and work experiences. Such external mentoring should earn a full credit as well.

MMTC and NOW POSITIONS: MMTC states that this proposed change is "unobjectionable." NOW does not oppose the proposed change "so long as the Commission sets minimal standards for such programs." The State Associations do not object to some guidance in this area so long as it is reasonable. Accordingly, the rule provision should be amended to read "establishment of a mentoring program for station personnel or for persons outside the station" for the reasons stated.

i. PROPOSED CLARIFICATION AND RATIONALE RE PAYMENT OF FEES FOR MENU OPTION CREDIT: At Subsection (c)(2)(xii), this initiative raises the question whether the Commission expects an SEU will have to pay a fee to a job bank, etc., in order to list its upper-level category openings in job banks and newsletters of the organizations described. The Commission should confirm that this is not its intent.

MMTC and NOW POSITIONS: MMTC states that the proposed change is "unobjectionable." NOW does not state any objection to the proposed clarification. Accordingly, the Commission should declare that it is not the FCC's intent that an SEU would have to pay a fee in order to obtain a credit under this menu option.

j. PROPOSED CLARIFICATION AND RATIONALE RE CREDIT ONLY FOR ASSISTING "UNAFFILIATED" NON-PROFIT ENTITIES : At Subsection (c)(2)(xiii), a credit is apparently limited to helping only "unaffiliated" non-profit organizations maintain websites that are used for broadcast employment and broadcast career development. The State Associations, NASBA and the NAB also provide very valuable outreach, career development and job search services through their website based career pages. An SEU should be allowed to earn a full credit for helping to maintain and enhance that effort, by publicizing the availability of these websites, etc. This matter would be moot if the Commission were to adopt the State Associations' "Internet Plus" proposal.

MMTC and NOW POSITIONS: MMTC does not appear to object to the State Associations' position on this credit. Rather, MMTC simply explains the importance of encouraging SEU's to assist nonprofit organizations which are not affiliated with the broadcast industry. NOW objects to any credit for help given to nonprofit organizations "affiliated" with the broadcast industry. The State Associations are not opposed to SEU's earning credits for assisting nonprofit organizations which are not affiliated with the broadcast industry. However, they are opposed to any governmental system that discriminates against nonprofit organizations which may have a connection to the broadcast industry. If, as NOW asserts, the key is the lack of an affiliation with the broadcast industry, query whether a broadcaster assisting MMTC would be eligible for a credit given the organization's ties to the broadcast industry by virtue of who is on its Board, its work for and business connections with various broadcast group owners, etc. Accordingly, the

Commission should amend the rule provision by inserting the words "unaffiliated or" before the word "affiliated."

k. PROPOSED CLARIFICATION AND RATIONALE RE EXTRA CREDITS FOR THE SAME TYPE OF EVENTS: This question has arisen since the Joint Petition was filed. For each two year "segment," an SEU may obtain a full credit if it participates in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions. If the same SEU were to participate in eight job fairs during the same two year segment, would the SEU be eligible to earn two full credits for that segment? Logically, since the credit program is intended to encourage desirable conduct, engaging in more of that conduct should also be rewarded through more credits. The Commission is asked to confirm this position.

9. Drafting Issues Regarding Section 73.2080(c)(4)

a. PROPOSED CHANGE AND RATIONALE RE USE OF THE MEDIA: Subsection (iv) of this Section makes it appear that each SEU must use print and other media when it recruits and therefore pay for such usage. This is not the State Associations' understanding of what is required. Accordingly, the Commission should remove the ambiguity by rephrasing the requirement to say "Where media is used for recruitment purposes, there shall be no indication...."

MMTC and NOW's POSITIONS: Neither MMTC nor NOW state any opposition to this proposal. Accordingly, the rule provision should be amended for the reasons stated.

b. PROPOSED CHANGE AND RATIONALE RE RELIGIOUS "BELIEF": The same Subsection (iv) should be amended by adding, at the end of the provision, the clause: "provided that a religious broadcaster may indicate a preference for a certain religious affiliation or belief." This is a necessary and appropriate rule provision qualifier because of the special rights of religious broadcasters.

MMTC and NOW POSITION: Neither MMTC nor NOW state any objection to this

proposed change. Accordingly, the rule provision should be amended for the reasons stated.

10. Recordkeeping and Reporting Regarding Race, Ethnicity and Gender

a. PROPOSED CLARIFICATION AND RATIONALE RE RECORDINGKEEPING AND REPORTING RACE, ETHNICITY AND GENDER: Given the requirements of Section (c)(5) relating to recordkeeping, the Commission should make it absolutely clear that no station or SEU is or will be required by any aspect of the new EEO Rule or any other FCC regulation to track or report the race, ethnicity or gender of any applicant, interviewee or hiree.

MMTC and NOW POSITIONS: Neither MMTC nor NOW state any objection to this proposed clarification. The fact that the Commission has stated that "outreach that is truly broad and inclusive will necessarily reach minorities and females…" (*Second R&O at* ¶ 77), underscores the need for stations to know whether they must be aware of, and thus check, the race, enthicity and gender of any applicant and interviewee, or not. Accordingly, this clarification and assurance should be given for the reasons stated.

b. PROPOSED CLARIFICATION OR RECONSIDERATION AND RATIONALE: In that same regard, it is not clear from the *Second R&O* whether the Commission has (i) adopted the requirement that stations file FCC Form 395-B but suspended the requirement for the time being or (ii) declined to adopt any such requirement at this time or in the future. For example, the Commission states that the data collected in the employment reports "will be used" only to compile trend reports and reports to Congress. In the same paragraph, however, the Commission states that it "will defer action on the issues relating to … workforce data collection requirements and address them in a future report and order." *Second R&O* at ¶ 17. As a precaution, the State Associations have specifically sought reconsideration of any action re-establishing a requirement for the filing of FCC Form 395-B. These reports cannot logically or legally be divorced from the new EEO Rule and related policies. Indeed, in its Petition for Clarification and Reconsideration filed February 6,

2003 (at pages 4-8), MMTC expressly links the FCC Form 395-B with the new EEO Rule. Any FCC requirement for public filing of station attributed 395-B type data, because of the concurrent operation of the new EEO Rule, will pressure broadcasters to recruit and hire based on race, ethnicity and gender. No words of admonition or reassurance from the Commission can negate the true implications of a combined EEO/395-B system. Broad and inclusive outreach will not be enough. Each station will feel governmental pressure to hire based on their race, ethnicity and gender.

MMTC and NOW POSITIONS: MMTC argues that requiring the public filing, on a station attributed basis, of FCC Form 395-B racial statistics is not unlawful. NOW is silent on the issue. The cases cited by MMTC are not apposite. Here the Commission holds the power of life and death over every station. Furthermore, the Commission has a very long track record of exerting governmental pressure on stations to recruit and hire based on race. This conclusion has been confirmed by the D.C. Circuit's decisions in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*") and *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, *reh'g denied,* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) ("*State Broadcasters*"). The legacy of that track record cannot be swept away by hollow promises. Rather, it can only be swept away either by an FCC decision not to reinstate FCC Form 395-B or by a decision to protect the identity of the filer through the use of an intermediary for receipt of the data.

11. Reconsideration of Section 73.2080(c)(6)

a. PROPOSED RECONSIDERATION AND RATIONALE RE REQUIREMENT FOR EEO PUBLIC FILE REPORTS: Even if the Commission were to conclude that the reasons given above are not sufficient to warrant an expansion of the class of SEU's which would not be subject to Subsections (b) and (c) generally, there is no adequate justification for the Subsection

(c)(6) requirement that every nonexempt SEU collect a year's worth of full-time recruitment/interview/hiring data, collate and tabulate it, record it onto an EEO Public File Report, have the draft Report reviewed by management and legal counsel, finalize it, place the final Report in the public inspection files of each station comprising the SEU, and post it on the websites of each such station. Notwithstanding these reporting requirements, the records of such SEU's remain subject to random inspections and audits. Given the constant threat of such inspections and audits, there is already a strong incentive for stations to widely disseminate job information, to fully comply with the new EEO Rule and to keep adequate records. Accordingly, the Commission should eliminate the requirement for EEO Public File Reports.

MMTC and NOW POSITIONS: Each opposes the elimination of the requirement that nonexempt SEU's produce, publicly file and post EEO Public File Reports on an annual basis on the ground that they are necessary to enable the public to assist the Commission in monitoring an SEU's compliance with the new EEO Rule. Notwithstanding their objection, the State Associations continue to urge the Commission to eliminate this requirement for the reasons stated.

b. PROPOSED CHANGE AND RATIONALE RE ENLARGING THE CLASS OF SEU'S EXEMPT FROM EEO PUBLIC FILE REPORTS: In the alternative, if the Commission insists on retaining the EEO Public File Report requirement generally, it should amend the new EEO Rule to provide that SEU's with fewer than 15 full-time employees are exempt from having to comply with Subsection (c)(6). As shown above, the incremental work effort required by the recordkeeping and reporting requirements is obvious and substantial. Accordingly, and for all the other reasons mentioned previously, the State Associations request that SEU's with fewer than 15 full-time employees be exempt from the requirement to produce an EEO Public File Report. The requirements of broad outreach and record retention would remain. The Commission can audit a station at any time and every licensee knows it. The Commission represents the public. The

public's own input can reasonably occur when an SEU files an application.

MMTC and NOW POSITIONS: Both MMTC and NOW oppose the proposal that SEU's with fewer than 15 full-time employees need not prepare an EEO Public File Report on an annual basis. The State Associations have already addressed the strong reasons for enlargement of this class of exempt SEU's generally. Those reasons are even more pertinent to this one provision. Furthermore, the very real possibility of FCC audits is a clearly sufficient incentive for all nonexempt SEU's to practice broad outreach, to keep adequate records of their efforts, and to otherwise fully comply with the new EEO Rule. MMTC does not actually argue to the contrary, but rather, argues that such reports are necessary to permit the public to play a role "in the enforcement of our civil rights laws." The problem with MMTC's position is that it does not explain any nexus between the information in the Report and the "civil rights laws." Accordingly, for the reasons already advanced, the Commission should exempt SEU's with fewer than 15 full-time employees from the requirement for annual EEO Public File Reports.

c. PROPOSED CHANGE AND RATIONALE RE STREAMLINING EEO PUBLIC FILE REPORTS: If the general requirement of annual EEO Public File Reports is to be retained, at the least the Commission should distinguish between those sources which have asked to be placed on an SEU's "mailing list" ("Eligible Referral Organizations") and those other organizations who have not but to whom the SEU job opening notices are sent. In drawing this distinction, the Commission should not require an SEU to identify in the EEO Public File Report any of the non-Eligible Referral Organizations. By simplifying these tasks, the Commission will have reduced some of the pressure on SEU's to fewer rather than more sources for referrals. SEU's would still be required to keep records identifying, by name of organization, address and telephone number, all of the referral sources they used for each such opening in the event of an audit. Thus, the request is made not to hide anything since the SEU would still be required to keep adequate records of such

"mailings" and the SEU is subject to audit. Rather the request is to reduce the burden of having to produce a report showing the names of hundreds upon hundreds of non-Eligible Referral Organizations on lists which may be different depending upon the job opening and upon whether new organizations are added and others dropped. The tabulation task alone will be enormous unless these reports are streamlined.

MMTC and NOW POSITIONS: MMTC does object to the State Associations' proposal that the annual EEO Public File Reports be streamlined. NOW does not state any objection to this proposal. MMTC essentially argues that it needs easy access to the lists of non-Eligible Referral Organizations used in order to prevent a broadcaster from concealing "the fact that most of its recruitment efforts are made through sources that exclude qualified persons based on race or gender." What incentive would any broadcaster have to exclude anyone from consideration? Does the Commission now believe that its role is to determine, with the "help" of stations, which referral organizations unlawfully discriminate? Is a broadcaster now to be charged with having to conduct due diligences to make sure that none of the Eligible Referral Sources which have contacted it, and that none of the other referral sources to whom job notices are sent, discriminate on the basis of race, ethnicity or gender? If MMTC is so concerned that these intermediary referral sources may be discriminators, why has it so discouraged broadcasters from communicating *directly* with potential applicants over the Internet! It appears that MMTC and NOW, with the help of the Commission, are essentially forcing broadcasters to deal *primarily* with intermediary referral sources (as distinguished from directly with potential applicants through the Internet) at the risk of dealing with some who may be discriminators in their own right. How sad that the government would put the broadcast industry in that predicament.

d. PROPOSAL AND RATIONALE RE ANOTHER WAY TO STREAMLINE EEO PUBLIC FILE REPORTS: As another way to streamline the annual EEO Public File Reports, the

State Associations have urged the Commission to drop any requirement that the name of the contact person be listed in the Report. The information is essentially "minutiae" grist for future litigation. There is no intent to hide anything. The SEU either sent a particular notice to an organization or it did not. It is irrelevant who may have been the contact person at a given point in time. By requiring the information, there is an implied requirement that every SEU know about any changes in the contact person and update its files if the contact person information changes. How realistic is it for an SEU to have to check constantly hundreds upon hundreds of referral organizations to see whether a certain the "original" contact person is still there with the organization. That would be absurd.

MMTC and NOW POSITIONS: MMTC states no objection to this proposal. NOW objects to the elimination of the requirement that a record of the name of the contact person at a referral source be retained and that such information be included among the data for the annual EEO Public File Reports. NOW's rationale is that "the EEO requirements do not require SEU's to update their files each time a contact person leaves a referral organization." On one level that is an adequate response if it is true. On another level, if there is no requirement for updating, why is the information required in the first place? This requirement is one more disincentive for broadcasters to add more and more contact referral sources. The State Associations continue their position that the names and telephone number of contact people not be required to be maintained and reported. The State Associations have no objection to reporting the name, address and telephone number of the referral organization itself. The other information is simply not necessary and is a certain target for endless litigation.

e. PROPOSAL AND RATIONALE RE AN ADDITIONAL WAY TO STREAMLINE EEO PUBLIC FILE REPORTS: The State Associations request that the Commission eliminate the requirement that the referral sources of all interviewees and hirees be disclosed in the annual EEO

Public File Reports. The only reason to require the "public" disclosure of such information is to place pressure on nonexempt SEU's to interview and hire persons referred from organizations that are commonly known as minority and women's organizations. That motivation and effect are contrary to the holdings of the Court's decisions in *Lutheran Church* and *State Broadcasters*.

MMTC and NOW POSITIONS: MMTC, in its Opposition to the Petition for Reconsideration filed by the Joint State Broadcasters, has opposed the elimination of the requirement as it relates to hirees. This proposal expands upon the proposal advanced by the Joint State Associations. Since the new EEO Rule is intended to focus on the process of recruitment, not on the results of recruitment, the requirement that the referral sources of all interviewees and hirees be publicly disclosed. The EEO Public File Report, if retained, will list all referral sources contacted for each job opening. On its face, that is sufficient to satisfy the Commission and the public that an SEU's efforts are broad and inclusive. The only reason to force public disclosure of the referral sources of all interviewees and hirees is to use the identity of the referral source as a type of proxy for race, ethnicity and gender in the quest to pressure stations to interview and hire on that basis. That is unconstitutional.

f. PROPOSED CHANGES AND RATIONALE RE THE REQUIREMENT FOR FILING AND POSTING "ON" THE ANNIVERSARY DATE: Section (c)(6) also requires nonexempt SEU's to place their EEO Public File Reports in their stations' public inspection files and to post them on their stations' web sites "on" the date which is the anniversary date of the deadline for the filing of a station's renewal application. There are two problems with this requirement. First, the requirement that an SEU do something "on" a date rather just "by" a date, is highly irregular, unnecessary on its face (now that the Media Bureau has, as an interim measure, allowed nonexempt SEU's to cut-off data up to 10 days before the deadline for the annual EEO Public File Report), and will lead to charges that this and that broadcaster was in "technical" violation of the

"on" requirement, or that a broadcaster has misrepresented since it actually publicly filed and posted it Report two days before the actual "on" deadline date. Second, an SEU with stations in Massachusetts would have to place such Report in the public files of its stations and post the Report on its web sites on December 1, 2003. The Report would cover the period March 10, 2003 through November 30, 2003. Realistically, the Commission cannot reasonably expect an SEU to have carefully, and completely prepared such Report, taking into account any hiring activity as late as November 30 and have the report reviewed and approved by higher-ups, including counsel, in such a short time frame. The problem cries out for the Commission to do what it has done for Quarterly Issues/Programs Lists and Annual Children's Television Programming Reports, namely allow a station 10 days from the close of the reporting period to place the reports in the station's public file and to post them on the station's web site. The same issue must be resolved for the filing of FCC Form 396. Furthermore, whatever date is chosen, it would be a deadline, not a fixed date "on" which to do something. The Media Bureau has taken a very positive step forward to rectify this problem by issuing its Interim Policy on March 31, 2003, as noted in the text of the Joint Reply to which this Exhibit is attached. That policy should be made permanent and extended to all annual EEO Public File Reports and FCC Form 396.

MMTC and NOW POSITIONS: Admittedly, the "on" problem was not raised in the Joint Petition because it was only recently determined to present a problem. The problem is obvious and the State Associations cannot think of any public interest downside of substituting the word "by" for "on." With respect to the April 1 deadline problem, neither MMTC nor NOW state any objection to this proposal. Accordingly, it should be adopted for the reasons stated. Alternatively, the State Associations would have not objection to the Commission allowing SEU's to "cut-off" the reporting period 10 days or longer before the applicable due date for the Report in order to allow SEU's the time necessary to prepare, finalize, publicly file and post their Reports. It

is not intended that this practice would create any gap in time reported since the reporting period for the next Report would run from the earlier cut-off one year forward to the next cut-off date.

g. PROPOSED CHANGE AND RATIONALE RE POSTING OF EEO PUBIC FILE REPORTS: The requirement for the posting of EEO Public File Reports should be eliminated. The contents of the public inspection file, including the annual EEO Public File Report, are available to the public, thereby providing all potential "interested parties" with sufficient information in a sufficiently accessible venue.

MMTC and NOW POSITIONS: MMTC and NOW oppose the elimination of the website posting requirement. The State Associations agree with one implication of MMTC's position. If the Internet posting of annual EEO Public File Reports is efficient for members of the public who may wish to have access to the information, the publicized Internet posting of job vacancies is also efficient for members of the public who may wish to have access to that information. In short, MMTC's position in favor of Internet posting of the annual EEO Public File Report totally undercuts its opposition to the State Associations' "Internet Plus" proposal.

h. PROPOSED CLARIFICATION AND RATIONALE RE USE OF "PDF" COPIES OF EEO PUBLIC FILE REPORT FOR POSTING: At the least, the FCC should allow "PDF" copies of such reports as attachments to the web sites.

MMTC and NOW POSITIONS: MMTC agrees that "it would be reasonable to attach PDF copies of the reports to station websites." NOW does not state any objection to the proposal. Accordingly, the Commission should make it clear that this technique is fully acceptable to meet the posting requirement.

i. PROPOSED CHANGE AND RATIONALE RE REPORTING REFERRAL SOURCES USED BY RELIGIOUS BROADCASTERS: Religious broadcasters should not have to report the religious referral sources of their interviewees and hirees. The disclosure of such

information will inevitably entangle the government in religion and chill a religious broadcaster's exercise of its religious freedom to employ co-religionists.

MMTC and NOW POSITIONS: MMTC opposes this proposal, saying that it does not understand how the requirement might "chill" a religious broadcaster's free exercise of religion. NOW does not state any objection to the proposal. First, MMTC does not deny that the requirement will inevitably entangle the government in religion. Past Commission experience shows the wisdom of avoiding such entanglement**.** *See, e.g., In re Applications of WQED Pittsburgh & Cornerstone Television, Inc.*, 15 FCC Rcd 202 (1999), vacated in part by 15 FCC Rcd 2534 (2000). Second, as to the chilling effect, a religious broadcaster may reasonably not want the public at large to know what relationships it may have with certain denominations, etc.

12. Definition of a "Permanent" versus "Temporary" Employee

PROPOSED CHANGE AND RATIONALE RE "PERMANENT" VERSUS "TEMPORARY" EMPLOYEES: The new EEO rule applies only to "full-time employees" which are defined in Subsection (e)(1) as "permanent employees whose regular work schedule is 30 hours per week or more." However, the Commission does not clearly define the difference between an employee who is a "permanent" employee versus one who is "temporary." The Commission should confirm through a new definition added as Subsection (e) that "a temporary employee is an employee whose term of employment is tied to a one-time event, or whose term is specifically limited in duration, such as in the case of a college student who is hired for the semester or school year."

MMTC AND NOW POSITIONS: MMTC states that

"Employing students is a principal means of providing entry opportunities. The [State Associations] do not explain how the public would benefit by denying EEO protection to students. Actually, students should receive heightened EEO protection."

MMTC's response is inappropriately sweeping and completely unresponsive to the narrow

question posed: what is a "temporary" employee in the eyes of the Commission for EEO purposes? Whether an employee is permanent or temporary, full-time or part-time, he or she will have the benefit of full "EEO protection" since every SEU must afford equal employment opportunity and practice nondiscrimination vis-à-vis such employees. MMTC does not seriously argue that temporary employee positions should be subject to the three prong requirements of the new EEO Rule. The State Associations would not object to a general rule that if a person is hired to perform regular functions for more than 6 months, the person should be treated as a permanent employee for purposes of the new EEO Rule. This position is not inconsistent with that of NOW. However, the Commission has historically stated that student interns are temporary employees or non-employee volunteers and that position should be reaffirmed. *Report and Order in MM Docket Nos. 98-204 and 96-16*, 15 FCC Rcd 2329 at ¶110 and n.38 (2000). Accordingly, the Commission should adopt the clarification sought by the State Associations. Broadcasters deserve the necessary guidance.

13. Definition of a "Station Employment Unit"

PROPOSED CHANGE AND RATIONALE RE COMMON CONNECTIONS BETWEEN STATIONS: The Subsection (e)(2) definition talks in terms of "commonly owned" stations. The Commission should confirm that the term "commonly owned" is intended to include "commonly controlled."

MMTC AND NOW POSITIONS: MMTC states that the proposed change is "unobjectionable." NOW, however, opposes the change. The State Associations point out that in its multiple ownership regulations, the Commission is careful to aggregate those interests that are "commonly controlled" with those that are "commonly owned." Accordingly, the State Associations urge the Commission to add the words "or commonly controlled" to the definition.

14. Definition of "Exigent Circumstances"

PROPOSED CHANGE AND RATIONALE RE "EXIGENT CIRCUMSTANCES": The

State Associations propose that a definition of "exigent circumstances" be added under Subsection (e). The examples given in the text of the *Second R&O* are unrealistically narrow. Rather the Commission should define "exigent circumstances" as follows:

" 'Exigent Circumstances' shall mean where there is a need to replace an employee and it is not commercially reasonable in the circumstances either (i) to publicize the opening before the person is asked to depart or (ii) to fill the opening after the person departs, even briefly, with one or more other station employees."

This definition places the goal of recruitment for all full-time openings into a commercially reasonable context, striking an appropriate balance in conflicting considerations.

MMTC AND NOW POSITIONS: MMTC and NOW both oppose the change on the ground that the proposed definition creates a potential loophole for compliance with the recruitment requirements. The trouble with their position is that any exception creates a potential loophole and thus the key is to define the exception with sufficient specificity that broadcasters and the general public will know when it applies and when it does not. This aspect of the new EEO Rule is likely to be the focus of repeated second-guessing by groups and others. At a minimum, the Commission should declare that the broadcaster's decision will not be second-guessed unless there is clear evidence of bad faith.

15. Reconsideration of Statement about "Owner-Employees"

PROPOSED CHANGE AND RATIONALE RE OWNER-EMPLOYEES: The Commission has concluded that only in narrow circumstances will a full-time position occupied by a station owner be exempt from the requirement of full recruitment. The exemption should be broadened to include any stockholder, partner or LLC member with a 5% or more interest, or any family member of any of such classes of persons. The Commission has historically favored integration of ownership into day-to-day management. By denigrating the status of ownership and employment, now the Commission is going in the opposite direction away from family and locally

owned business.

MMTC and NOW POSITION: MMTC wrongly states that the State Associations have not provided any justification for the proposed change, but then provides its own justification for the change. MMTC agrees that the definition of "owner-employee" should track the Commission's attribution rules. Under those rules, a person is deemed to have an attributable interest in a corporation if he or she holds at least 5%, the very percent which the State Associations have used in their proposal. NOW opposes the change, arguing that since stockholders, partners and LLC members "often take their shared or limited interests in a company to limit [their] liabilities" they do not have the kind of "more direct liability and control" that are true "incidents of ownership." The distinction NOW draws is absurd. Lowry May, who is a stockholder of Clear Channel, certainly does not lack the necessary "incidents of ownership" simply because he is a stockholder and Clear Channel is not a sole proprietorship. Accordingly, the Commission should restate the exemption along the lines proposed by the State Associations for the reasons stated.

16. Drafting Issues Regarding the FCC EEO Forms

Some of the FCC Forms that the Commission now requires SEU's to file contain errors that should be corrected before they are relied upon and filed:

a. FCC FORM 396-A

i. PROPOSED CHANGE AND RATIONALE RE RELIGIOUS BROADCASTERS: To avoid misleading filers who are religious broadcasters and the general public at large, the form should expressly state that in the case of a religious broadcaster who is filling out the form, the reference to "religion" in Section I (General Policy) and in Sections I, II and III (Model Program) need not be part of the religious broadcaster's policy and program and thus may be deleted by such filer.

MMTC and NOW POSITIONS: MMTC states that the "language on religion

in [this proposal] is unobjectionable." NOW does not state any objection to this proposal. Accordingly, the FCC Form should be so modified for the reasons stated.

ii. PROPOSED CHANGE AND RATIONALE RE UNPRODUCTIVE SOURCES: The requirement in Section V that "nonproductive" sources may not be relied upon should be stricken for several reasons. First, it is inconsistent with the requirement that stations send job notices to all Eligible Referral Organizations regardless of their "productivity." Second, the entire concept of determining "productivity" is unnecessary, entirely subjective and implicates constitutionally inappropriate considerations. Why is it important not to use sources which may not be productive during some period of time, even though the source may become productive upon a later change in management, etc.? What does the FCC mean by "nonproductive" and over what period of time. Does the Commission mean that a particular source has not referred any or enough persons within a certain period of time? Or enough "qualified" persons within a certain period of time? Or enough persons of a certain race, ethnicity or gender within a certain period of time? What period of time does the Commission have in mind? It is imperative that stations be told if this unnecessary and unreasonable requirement is maintained.

MMTC and NOW POSITIONS: MMTC supports this requirement, arguing that just as it is unprofessional for a broadcaster to expect to generate sales from "nonproductive accounts," it is unprofessional for a broadcaster to expect to generate referrals from a nonproductive referral source. There are several problems with MMTC's position. First, putting aside the poor analogy, a station is not free to drop any Eligible Referral Source from its outreach "mailing lists" even if it has been unproductive. Why should those types of sources be immune from the same scrutiny? Second, a requirement that a broadcaster not rely upon "nonproductive" sources logically implies that a broadcaster must monitor the "productivity" of all of its referral sources. Such monitoring logically implies that a broadcaster determine the referral source of all applicants, not

just interviewees and hirees. However, that obligation will require the broadcaster to spend whatever time it takes to track down every applicant, for every job opening, when the person's referral source is not apparent from the application or resume. This cascading set of tasks looks a lot like the former requirement that broadcasters take the time to call applicants to determine their race, ethnicity and gender, a practice that placed the broadcast industry in an embarrassingly negative light. In the *Second R&O* (at¶ 135), the Commission states that "We will not require the retention of records of the recruitment sources of applicants." Read carefully however, this could be interpreted to mean that, yes, each nonexempt SEU must track down the referral sources of each applicant, but after it has tabulated which sources referred applicants for a particular opening, the SEU is free to throw out the underlying applications. The entire concept of determining referral source "productivity" is slipperly slope into subjective and inappropriate evaluations. If outreach, and not output, is the true measure of the new EEO Rule, then it is completely unnecessary to pass judgment on the productivity or lack of productivity of any referral source under any measure. Whatever the Commission's original intention, there should be no explicit or implicit requirement that an SEU determine the productivity of a referral source or that it be prohibited from relying upon a referral source because of any "lack of productivity" over a certain period of time.

b. FCC FORM 396

i. PROPOSED CHANGE AND RATIONALE RE RELIGIOUS BROADCASTERS The changes urged above (*see* ¶ 16, a, ii) in FCC Form 396-A for religious broadcasters should be made on this form as well for the same reasons.

MMTC and NOW POSITIONS: Neither MMTC nor NOW state any objection to this proposal. Accordingly, the Commission should make the requested change for the reasons stated.

ii. PROPOSED CHANGE AND RATIONALE RE SCOPE OF

"DISCRIMINATION COMPLAINTS": The Commission should clarify whether the term "Discrimination Complaints" is intended to include those involving allegations of unlawful discrimination based only on race, color, religion, national origin or gender, or on other factors such as age, physical or mental handicap, or other bases.

MMTC and NOW POSITIONS: MMTC states that discrimination based on age or handicap should also be disclosed. The State Associations do not object. Accordingly, the Commission should expressly clarify this on FCC Form 396 for the reasons stated.

iii. PROPOSED CHANGE AND RATIONALE RE "NARRATIVE STATEMENT": Under Section II, the Narrative Statement should be stricken. Since stations' two annual EEO Public File Reports will be attached to the form when filed with the FCC, the only additional information the filer could supply to support a claim of having achieved broad outreach would be information such as the recruitment sources of all applicants, the race, ethnicity and gender of all applicants and interviewees, and a comparison of that information to the racial, ethnic and gender profile of its community, all of which have been found unconstitutional. In addition, the Commission requires the filer to explain any "difficulties" experienced in its outreach efforts. Is this intended to elicit whether the filer experienced difficulties in attracting enough applicants overall? Enough applicants overall based on race, ethnicity or gender? Enough from each particular referral source? The Commission needs to make itself clear. Otherwise, it is impossible for a filer to know what information the Commission is looking for in response to the question.

MMTC and NOW POSITIONS: Neither MMTC nor NOW state any objection to this proposal. Accordingly, the proposed deletion should be made for the reasons stated.

iv. PROPOSED CLARIFICATION AND RATIONALE RE FILING REQUIREMENTS: When must a filer report to the Commission a change in the name and/or title

of the person responsible for implementation of the SEU's EEO program?

MMTC and NOW's POSITIONS: Neither MMTC nor NOW stated any objection to the Commission giving the necessary guidance in this area. Accordingly, such guidance should be given for reasons that are apparent.

c. FCC FORM 397

i. PROPOSED CHANGE AND RATIONALE RE FILING REQUIREMENTS: The first paragraph of the form does not state what radio SEU's must file the form. Furthermore, it is not clear from the second sentence of the first paragraph and the fourth paragraph of the Filing Instructions whether television SEU's with fewer than 5 full-time employees and radio station SEUs with fewer than 10 full-time employees are required to file the form at all, or only the first two pages of the form. Given this confusion, how can the Commission reasonably expect a licensee to certify compliance with their filing obligations in their license renewal applications? The Commission should correct the form before it is required to be used.

MMTC and NOW POSITIONS: Neither state any objection to this proposed change. Accordingly, the Commission should make the requested corrections/clarifications for the reasons stated.

ii. PROPOSED CLARIFICATION AND RATIONALE RE UPDATING INFORMATION: When must a filer report a change in the name and/or title of the person responsible for implementation of the SEU's EEO program?

MMTC and NOW POSITIONS: Neither address the issue and thus, for the reasons stated, the Commission should issue the requested clarification.

17. Need for Publication of a Base Forfeiture for EEO Violations

PROPOSED CHANGE AND RATIONALE RE BASE FORFEITURE: The Commission has not disclosed what the base forfeiture amount will be for a violation of the new EEO Rule.

Legal principles of fundamental fairness dictate that the Commission publicly announce that figure as well as any aggravating and mitigating factors that it will consider.

MMTC and NOW POSITIONS: MMTC argues that forfeiture amounts for EEO violations are contained in the Commission's rules and in the Communications Act. The only citation it provides is not specific to the new EEO regulations. The Commission should decide now and disclose the amounts. If a base forfeiture is intended to deter noncompliance, it will not do its job unless it is publicly known. Accordingly, the Commission has its own interest in determining what the base amount will be and in publicly disclosing it.

STATE ASSOCIATIONS' JOINT REPLY

Exhibit B

STATE ASSOCIATIONS' JOINT REPLY
EXHIBIT B

In order to assist the Commission's review in this proceeding, the State Associations have reproduced the following chart of the activities that MMTC Declarant, Edward Pena, believes stations can do with the little or no effort to comply with the Commission's new EEO Rule. The chart was submitted as an exhibit to MMTC's Partial Opposition. Beneath each activity is an italicized section demonstrating, based on the more obvious deficiencies in Mr. Pena's chart, that he has substantially understated the number of tasks and amount of time required to perform them.

I. Activities Already Performed To Comply With Federal/State EEO And OFCCP Rules

The assertion that these activities are already required of all broadcasters is highly questionable. For example, by no means are all broadcasters subject to the OFCCP rules. In any event, Mr. Pena's estimates are substantially understated for the reasons stated below.

Pena Activity

1. Prepare staff training on EEO (except FCC rules)

   The scope of this training and the number of staff members subject to this training are unstated. These variables could have a very significant upward or downward effect on the time to be allotted.

2. Train the staff on EEO (except FCC rules)

   Same issues as with #1

3. Answer staff questions during year (except on FCC rules)

   The time allotted does not expressly take into consideration circumstances when the questions will require not just answers, but follow-up research or conduct which would have a substantial upward effect on the figures provided.

4. Set up and review recordkeeping system

   There is no information provided which identifies the nature or elements of the "recordkeeping system." Without that information, it is impossible to assess the credibility of the figures provided.

5. Maintain applicant flow data log

   Assuming that the word "maintain" means "fill-in" the log, there is still no information provided which describes the "log." Without that information, it is impossible to assess what information the log

is intended to capture and therefore it cannot be determined how long it would take a person to obtain the information and log it in.

6. Build and update job referral lists

This estimate must assume a very limited referral list, with very few updates over a year, and with very few communications between the station and the referral source. In reality, this step would require, at a minimum, compiling and preparing listings of the recruitment sources used to fill each vacancy, including any organizations which requested notification (separately identifying each organization) and the name, address, contact person and telephone number of each recruitment source contacted to fill each position,, as well as the date each vacancy was filled and the recruitment source that referred each applicant and hiree. It would also require the preparation of records that include the total number of interviewees for each vacancy and the referral source for each interviewee. In short, Mr. Pena's estimate is useless without reference to particular stations.

7. E-mail job notices to job referral lists

This estimate is patently understated. First, it is inconceivable that all referral sources have e-mail capability or even fax capability. In addition, a station must develop a description of each particular job vacancy and then e-mail some of the notices, fax some of the notices, and mail some of the notices, keeping detailed records and copies of notices sent. Depending upon the size of the referral list and the number of openings, these tasks should occupy a considerable amount of time.

II. Community Activities Performed By Most Broadcasters In The Normal Course

It is not clear whether this break-out is intended by the Declarant to show how little effort is involved in earning the requisite number of menu option, non-vacancy specific, outreach initiative credits. In any event, this Section is not pertinent to the State Associations' concerns about the recordkeeping/reporting burdens associated with vacancy-specific outreach efforts. Furthermore, it cannot be determined what "n/a" means in reference to addressing a community group convention or serving on a scholarship committee.

1. Speak at two schools' career days
2. Address community group convention
3. Serve on scholarship committee

III. Activities Specific To Compliance With New FCC EOO Regulations

1. Read FCC rules; review rule compliance with counsel

   The allotted time is unusually modest given the importance of the subject matter and the fact that every station should involve communications counsel in this matter. Furthermore, this activity does not take into consideration the fact that top management attending a legal seminar on the new EEO regulations can expect to spend 2-3 hours at the session and then additional hours going through the new regulations and a typical EEO Legal Guide which includes the FCC Forms, as well as reading the FCC Second Report and Order which alone takes more than 2 hours. Furthermore, this activity does not take into consideration the need to construct information and data forms that relate directly to the information and data that the Commission requires stations to gather under the new EEO regulations. Such information includes the names and telephone numbers of contact persons at all referral sources, the referral source of every applicant, etc.

2. Add FCC rules to General EEO training material

3. Train staff on FCC duties not required by other rules

   Same issues as with Section III, #1

4. Answer staff questions during year (just on FCC rules)

   The time allotted does not take into consideration circumstances when the questions will require not just answers, but follow-up research or conduct which would have a substantial upward effect on the figures provided.

5. Fill out FCC EEO Forms (per FCC's time estimates)

   The figures provided do not take into account the efforts expended by the station in running down a variety of data that are required under the new EEO Rule. For example, a station is apparently required to know and thus update the names and telephone numbers of the contact persons at all referral sources. This would mean, for example, that before a station prepares and finalizes its annual EEO Public File Report, the station would have to contact every referral source by mail, fax and e-mail to verify the telephone number of every contact person. Referral lists, as evidenced by the lists compiled by many of the State Associations can contain upwards of ***some 700 referral organizations****. The more openings, the more time and cost involved in sending notices, keeping records, checking and double checking data (name and number of "contact persons" for each organization), tabulating the data, completing the reporting, etc. Running down this*

information alone could burden station staff for days and weeks on end.

As another example, a station is apparently required to evaluate the productivity of every referral source. T o do that, a station will have to keep track of the referral source of every applicant, not just every interviewee and hiree. If, as is likely to be the case, a station receives many applicants which do not indicate the referral source, the station must contact every such applicant. Gathering this information alone would create considerable additional time burdens for station staff.

In addition, this activity does not take into consideration that the annual EEO Public File Report is not an FCC form and thus must be created and competed only after all of the required information is obtained and tabulated.

Finally, this activity does not include the information gathering and tabulation tasks required to prepare each of the forms.

6. Maintain EEO portion of FCC public file

This activity does not take into consideration creating the annual EEO Public File Report and then uploading it to the websites of each station comprising a nonexempt SEU.

7. E-mail job notices to job referral lists (see above)

This estimate is unreasonable on its face. As an initial matter, it is unlikely that all referral sources have e-mail capability or even fax capability. In addition, a station must develop a description of each particular job vacancy and then e-mail some of the notices, fax some of the notices, and mail some of the notices, keeping detailed records and copies of notices sent. This would also require stations to develop, populate, and maintain a database linked to listserv email system containing contact information and specified requests from all responding referral sources. Depending upon the size of the referral list, the unavailability of sources not having e-mail capability, and the number of openings, these tasks will occupy a considerable amount of time.

8. Participate in two job fairs

Not relevant to this analysis

9. Train referral source personnel about broadcasting

Not relevant to this analysis

10. Hold monthly meetings with mentee

    Not relevant to this analysis

11. E-mail openings to NASBA job bank

    Not relevant to this analysis

12. E-mail upper-level job to trade group

    Not relevant to this anlaysis

CERTIFICATE OF SERVICE

I, Julia Colish, a secretary with the law firm of Shaw Pittman LLP, hereby certify that copies of the foregoing **"JOINT CONSOLIDATED REPLY TO THE TWO PARTIAL OPPOSITIONS FILED AGAINST THE FORTY-PLUS STATE BROADCASTERS ASSOCIATIONS' "JOINT PETITION FOR RECONSIDERATION AND CLARIFICATION"** were served via U.S. mail on this 3rd day of April, 2003 on the following:

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